TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 268.

HIPPOLITE FILHIOL, FRANCIS J. WATTS, HARRIET WATKINS, ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE H. TORNEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED APRIL 6, 1900.

(18,384.)

22995

(18,884.)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 8, 1903.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western division of the eastern district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardie H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Amdre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse by thier mother and next friend all residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, Margaret A. Horton Campbell, all residents of the State of Texas; Lizzie S. Cochran, Robert R. Sanford, and Charles D. Sanford residents of the State of Mississippi; Mary A. Bres, resident of the State of Illinois; Ellen M. Parker resident of the State of California; George B. Muse and Mary L. Muse residents of the State of Minnesota; Malvina R. Muse Bowman, resident of the State of Wisconsin; Bessie Muse resident of the State of Iowa; James Fort Muse resident of the State of Oregon; Mary E. Behen resident of the State of Missouri; Alice F. South resident of Mexico and Victoria A. Horton Bart-olomew now Mrs. J. D. A. Harris resident of the State of Washington; Frederick Horton and Joseph E. J. Muse residence unknown, plaintiffs, and George H. Torney, defendant, a manifest error hath happened, to the great damage of the said plaintiffs as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly; you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of March, in the year of our Lord one thousand nine hundred and three.

W. P. FEILD,
Clerk of the Circuit Court of the United States, West. Div., East. Dist. Ark.

Allowed by—
JACOB TRIEBER,
Judge, East. Dist. Arkansas.

Service — this writ acknowledged this 14th March 1903.
WM. G. WHIPPLE,
Att'y for Def't.

Endorsed: Filed M'ch 14, 1903. W. P. Feild, clerk.

1 Be it remembered that on the 14th day of August, 1902 came into the office of the clerk of the circuit court of the United States for the western division of the eastern district of Arkansas Hippolite Filhiol, Francis J. Watts, Harriot L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julia M. Waters, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andrae A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse by their mother and next friend, all residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Margaret A. Horton Campbell, Blanch- F. Power, Robert W. Fenner all residents of the State of Texas; Lizzie S. Cochran, Robert R. Sanford, and Charles C. Sanford residents of the State of Mississippi; Mary A. Bres, resident of the State of Illinois; Ellen M. Parker, resident of the State of California; George B. Muse and Mary L. Muse residents of the State of Minnesota; Malvina R. Muse Bowman resident of the State of Wisconsin; Bessie Muse resident of the State of Iowa; James Fort Muse resident of the State of Oregon; Mary E. Behen resident of the State of Missouri; Alice F. South resident of Mexico and Victoria A. Horton Bartholomew, now Mrs. J. D. A. Harris of the State of Washington; Frederick Horton and Joseph E. J. Muse residence unknown by W. S. and F. L. McCain Esqs., their attorneys and filed therein their bill of complaint at law with exhibits against George H. Torney which complaint is in words and figures following to wit:

2 In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL, FRANCIS J. WATTS, HARRIET L. WATKINS, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse, by Their Mother and Next Friend, All Residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, Margaret A. Horton Campbell, All Residents of the State of Texas; Lizzie S. Cochran, Robert R. Sanford, and Charles C. Sanford, Residents of the State of Mississippi; Mary A. Bres, Resident of the State of Illinois; Ellen M. Parker, Resident of the State of California; George B. Muse and Mary L. Muse, Residents of the State of Minnesota; Malvina R. Muse Bowman, Resident of the State of Wisconsin; Bessie Muse, Resident of the State of Iowa; James Fort Muse, Resident of the State of Oregon; Mary E. Behen, Resident of the State of Missouri; Alice F. South, Resident of Mexico, and Victoria A. Horton Bartholomew, Now Mrs. J. D. A. Harris, Resident of the State of Washington; Frederick Horton and Joseph E. J. Muse, Residence Unknown,

vs.

GEORGE H. TORNEY.

The plaintiffs state that in the year A. D. 1821 Don Juan Filhiol, who was then a citizen and resident of the State of Louisiana died intestate, and the plaintiffs herein, citizens of the United States, are his descendants, and his only descendants and heirs, and each and every one of said Filhiol's descendants who are dead died intestate—at least so far as the lands hereinafter described are concerned; that said Filhiol was born in the year 1740, and settled in Louisiana in the year 1779, and was appointed in the year 1783 by the King of Spain a captain in the latter's army and commandant of the militia, and assigned to duty at the post of Ouachita, Louisiana under Don Estevan Miro, the governor general of the province of Louisiana; that during the years from 1783 to 1789, inclusive, Don Estevan Miro was the governor general of the province of Louisiana under and by authority of the King of Spain and was by the King of Spain duly authorized and empowered to represent and act in behalf
3 of said king as his regent and governor and to do such acts and make such grants of land in said province as the king himself might do and make, and during the same period last aforesaid Don Carlos Trudeau was the royal surveyor general of the said province, thereto duly appointed and by the king vested with all the powers appertaining to such office by the law and customs of the Kingdom of Spain and that both said Miro as such governor and said Trudeau as such surveyor general, were duly authorized and

empowered to do and perform all the acts hereinafter stated to have been done and performed by them respectively and therein represented to the said king, and their said acts were legal and binding upon the said king as if done and performed by him according to the laws and customs of said kingdom. That on December 12, 1787, said Don Juan Filhiol memorialized the governor of the province of Louisiana and West Florida for a grant of land, whereon the governor ordered the land applied for to be surveyed, and thereafter before the 22nd day of February, 1788, Don Carlos Trudeau, the then surveyor general of the province of Louisiana, made a survey of the said land in accordance with the laws then existing and made a report thereof, with figurative plan and procès verbal, or certificate of description of the land to be granted, in due form, in and by which the said land was described as follows to wit: A tract of land with a front of eighty-four arpens, and a depth of forty-two arpens on each side of the stream called "La Source of d'Eau Chaude," about two leagues distance from its entrance into the Ouachita, having the Hot Springs for its center, its limits extending in parallel lines east and west to its full depth, and bounded on both sides by land belonging to the crown. That upon such report of said surveyor general and such figurative plan and process verbal, or certificate of description so made and returned to him the said Governor Don Estevan Miro, in his capacity as repre-
4 sentative of the King of Spain, did then make and deliver to the said Don Juan Filhiol a royal grant for that certain league of land, so surveyed, represented on said figurative plan, and described in said process verbal, or certificate, by said surveyor general, and the said royal grant is now in the possession of these plaintiffs, ready to be produced as the court may direct, and the same is hereinafter set forth in this complaint.

That said grant of land was made to their said ancestor, Don Juan Filhiol, while he was acting as commandant of the post of Ouachita, as a reward for his civil and military services in his capacity as commandant of that then important post, and other valuable and distinguished services by him rendered to the King of Spain; that the said Don Estevan Miro, in his capacity as governor general of Louisiana was by the Spanish colonial laws vested with power to make said grant of land and convey by said grant the absolute fee simple to the land thus granted; that said land so granted by the said Don Estevan Miro, as governor, on the 22nd day of February, 1788, to the said Don Juan Filhiol, consisted of a certain one-square league of land with the Hot Springs, at the city of Hot Springs, in Garland county and State of Arkansas aforesaid as the center of said league, the description, metes and bounds of which league of land are more fully and accurately measured and described in said survey, figurative plan, and process verbal, of the said Don Carlos Trudeau, hereinbefore mentioned; that such description as so surveyed, represented on said figurative plan and set forth in said process verbal, and by said grant conveyed to said Don Juan Filhiol is definite and certain and applicable to the land described so as to

distinguish and identify the same; said land embraced the land in controversy hereinafter described; that said grant is in the Spanish language and is in the words and figures following to-wit:—

De los Reales Exercitos Gobernador, e Intendente de las Pro-
5 vincias de las Lusiana y Florida Occidental e Inspector de sus Tropas &ª:

Vistas las antecedentes diligencias practicadas por el Agrimensor de esta Provincia Dª Carlos Trudeau sobre la posecion que ha dado al Sᵒʳ Dª Juan Filhiol Comandante del Puesto de Oachita de un terreno de una Legua quadrada situada en el Distrito de Arcansas sobre el lado por el norte del Rio Oachita como dos leguas y medio distante del dicho Rio Oachita y ontendido de qᵘ este Terreno sera media de manera que se incluera el sitio, o paraje conocida por el nombre de los Aguas calientes y demas que expresa el Plano figurativo y certificacion del dicho Agrimensor Trudeau que antecede y reconociendo esta reglada al orden del Agrimensura, aprovando como provamos estas diligencias usando de la facultad que el Ray nos tiene concedida, ortogamos en su Real nombre al dicho Juan Filhiol el referido legua de tierra para que como propias dispanga de allos y los usufrute. Damos la presente firmada de neustra sellada con el sello de nuestras Armas y refrendada por el infrascrito por S. M. de este Gobierno e Intendencia. En la Nueva Orleans a veinte y dos de Febrero de mil setecientos ochenta y ocho—

[L. S.] ESTÉVAN MIRO.

Por mᵈᵒ de su Sʳⁱᵃ
ANDES LOPEZ ARMISTO.

Registrado.

The following is a true and correct translation into the English language of said grant:

Governor of the royal armies and intendant of the province of Louisiana and West Florida and inspector of his troops, etc.:

Having examined the foregoing record of the proceedings taken by Don Carlos Trudeau, surveyor general of this province, concern-
in- the possession which has been given to Senor Don Juan
6 Filhiol commandant of the post of Ouachita, of a tract of land one league square situated in the district of Arkansas, on the north side of the River Ouachita, at about two leagues and a half distance from the said River Ouachita, it being understood that this tract of land shall be surveyed so as to include the place known by the name of Hot Waters, as is beside expressed in the figurative plan and certificate of the said surveyor Trudeau, above named, and recognizing the same to have been made in conformity to the order of survey, approving as we do hereby approve the said proceedings, using the faculty which the king has vested in us we

do hereby grant in his royal name unto the said Don Juan Filhiol the said league of land in order that he may dispose of the same and the usufruct thereof as his own.

We give these presents under our hand, sealed with the seal of our own arms, and attested by the undersigned secretary of His Majesty in the government and intendance.

In New Orleans, in the 22nd day of February, 1788.

[L. S.] ESTEVAN MIRO.

By mandate of His Excellency;
ANDES LOPEZ ARMISTO.

Registered.

That in and by the said grant the said Don Juan Filhiol, the ancestor of the plaintiffs, was duly and fully vested with an absolute title to the said tract of land of one league square, without any other or further act by him to be done and performed. But that after the making and delivering of said grant to the said Don Juan Filhiol by the said Miro, as governor of said province, as aforesaid, to-wit, on the sixth day of December, 1788, one Carlos Trudeau, who was then the royal and special surveyor of the province of Louisiana made, executed and delivered a certificate of survey of said grant of land to said Don Juan Filhiol which certificate of survey so made and delivered is in the Spanish language and
7 is in the words and figures following to-wit:—

Dⁿ Carlos Trudeau, agrimensor Real y Particular de la Provincia de la Luisiana en Consequencia de un Memorial firmado el dia doce de Diciembre del ano mil setecientos ochenta y siete por Dⁿ Juan Filhiol Commandant del Puesto del Oachita y de orden de su Senᵃ el Sʳ Dⁿ Esteban Miro Brigadʳ de los Rˢ Exˢ Gobʳ intendente de la provᵃ de la Luisiana florida Occidental &c. con fecha el dia 22 de Febᵒ de 1788 mandandome de dar possession al antedicho Commandante un terrano de una legua quadrada situada en el distrito de Arkansas que se incluara aquel paraje conocida por el nombre de los Aguas Calientes, y en Conformidad del entedicho Orden Certificio aver medido a favor del antedicho Comᵗᵉ Sʳ Dⁿ Juan Filhiol la legua de tierra indicada por el Memorial situada sobre el lado del norte del rio Oachita en el distrito de Arkansas Como dos leguas medio distante del dicho Rio Oachita, que sera verificado por el plano figurativo que acompane armados en Conformidad del apeo del dia Seis del present mes de Diciembre y del Corriente ano de mil Seticinetos Ochenta y Ocho ano.

CARLOS TRUDEAU.

Don Estevan Miro Brigadier.

The *the* following is a true and correct translation into the English language of the said certificate:

Don Carlos Trudeau, royal and special land surveyor of the

province of Louisiana, in consequence of a memorial signed on the 12th day of December of the year 1787, by Don Juan Filhiol, commandant of the post of Ouachita, and by order of His Excellency Don Estevan Miro, brigadier of the R. ex gob., intendant of the province of Louisiana, West Florida etc., dated the 22nd day of February, 1788, directing me to give possession to the aforesaid commandant of a tract of land one league square, situated in the district of Arkansas, to include that spot known by the name
8 of Warm Waters. and in conformity with the aforesaid order, I certify having served in favor of the aforesaid commandant, Don Juan Filhiol the league of land indicated in the memorial situated on the north side of the Ouachita river in the district of Arkansas, at about two leagues and a half distant from said river to be varified by the figurative plan which accompanies in conformity with the actual survey of the 6th of the present month of December and of the current year 1788.

CARLOS TRUDEAU.

Don Estevan Miro, brigadier.

That the making and delivering of said certificate by the said Trudeau was a delivery of the judicial possession of said land, and had the force and effect of segregating the said tract from the public domain, and with the grant aforesaid vested full and complete title thereto in said grantee.

The plaintiffs further state that the original survey, figurative plan and process verbal, so made as aforesaid, by the said Trudeau as surveyor general has become lost and perhaps destroyed, but that they can, as they verily believe, prove the contents thereof with substantial completeness and accuracy, if they shall be unable to recover the originals.

The plaintiffs further state that in the year 1799, and on the 17th day of July, 1799, —— Morales was the governor of the said province of Louisiana, by authority and appointment of the King of Spain, and on said day, in the exercise of royal authority, made and promulgated a regulation of law to govern the future conveyance of land in the province by the subjects of the King of Spain of which the following is a copy, to-wit:

To avoid for the future the litigations and confusions of which we have examples every day, we have also judged it very
9 requisite that the notaries of this city and the commandants of the posts shall not take any acknowledgement of conveyance of land obtained by concession, unless the seller (grantor) presents and delivers to the buyer the title which he has obtained and in addition being careful to insert in the deed the metes and bounds and other descriptions which result from the title and the procès verbal of the survey which ought to accompany it.

Said plaintiffs further state that the said Don Juan Filhiol, their said ancestor, did sell and convey by deed the said league of land described herein to his son-in-law Narcisso Bourgeat, on the 25th

day of November, 1803; that said deed from said Don Juan Filhiol to the said Narcisso Bourgeat was passed before Don Vinciente Fernandez Texiero, lieutenant of the regiment of infantry and military and civil commandant of the district and jurisdiction of Ouachita, which deed was witnessed by Senor Baron de Bastrop and Don Jose Pomet who signed the act in the presence of Don Alex Breard, Don Carlos Bettin, and Don Francisco Carvet, all of whom were principal men in Ouachita at the date thereof; that said deed from Don Juan Filhiol to the said Narcisso Bourgeat is in the Spanish language but which when translated into the English language is as follows to-wit:—

"Be it known to all to whom this act may come, that I Don Juan Filhiol, captain in the army, commandant of the militia of this district do authenticate that I really and effectually do sell to Narcisso Bourgeat, my son-in-law, and resident of this district a tract of land with a front of eight--four arpens, and a depth of forty-two arpens on each side of the stream called "La Source d'Eau Chaude," about two leagues distant from its entrance into the Ouachita, having the Hot Springs for its center; its limits extending in parallel lines east and west to its full depth, and bounded on both sides by lands belonging to the crown, the same which belomgs to me by virtue of a grant obtained -rom Senor Don Estevan Miro, then governor of these provinces, dated the 12th day of December, 1787. I sell the same to the above named Bourgeat with all its ways of entrance and exits, uses, stated customs and servitude, free from all charge and mortgage, for the price of one thousand two hundred dollars, good money, which he has paid me in cash, for which sum I acknowle-ge the receipt, and to obviate the actual receipt thereof at this moment, I renounce the exception of *numerata pecunia* and do formerly authenticate that I receive it; wherefore I abandon and relinquish all title, possession, use, dominion seigniory I may have had, or held in and to said tract of land, and do grant unto and renounce in favor of, and transfer to this purchaser all of such title and rights thereto, and in whom such a right and title may be, that he may possess, sell, exchange, alienate, according to his own wish, and set forth in this writing which I pass in his favor in testimony of real delivery of said property, so that it may be seen and understood that he acquires possession thereof without any other proof of which he is hereby relieved, and to secure him against eviction, and to insure the reality and perfection of this sale, I hereby effect and obligate thereto all the property I now have, or may have hereafter, and do hereby insert the clause of full guaranty, and do renounce all laws in my favor in general and in particular. And being present at the passing of this act, I, the above named Narcisso Bourgeat, accept the same, acknowledging to have purchased the said land in quantity and shape as herein sold to me, and which I accept as a delivery and formally acknowledge the possession, in testimony of which this deed is passed, in the district of

Ouachita on the 25th day of the month of November, one thousand eight hundred and three.

I, Don Vincente Fernandez Texiero, lieutenant of the regi-
11 ment of infantry of Louisiana, and military and civil com-
mander of this district and jurisdiction, certify that I know the contracting parties hereto, which act is affirmed by Senor Baron De Bastrop and Don Jose Pomet, who are present assisting, in the presence of Don Alexander Breard, Don Carlos Bettin and Don Francisco Cavet, all of whom are residents of this district.

The interlineation Cavet is part of this act and the erasure Bettin is not.

JUAN FILHIOL.
NARCISSO BOURGEAT.

Before me the commander
VINCENTE FERNANDEZ TEXEIRO.

BARON DE BASTROP.
J'E POMET.

Which deed was immediately thereafter duly reported in the proper office of the province of Louisiana, in accordance with the law then existing, and was afterwards duly recorded in said office.

Copies of the said deed and the deed of retrocession from said Bourgeat to Filhiol, hereinafter mentioned, in the original Spanish and French language, properly certified by the officers in charge of them, attached and endorsed thereon are herewith filed, marked, respectively, Exhibits "X" and "Z," the originals still being kept on file as required by law.

That the said Narcisso Bourgeat retroceded the same lands sold to him, as aforesaid by the said Don Juan Filhiol, to the said Don Juan Filhiol by a deed passed before J. Poydras, judge of the court of the parish of Pointe Coupee, July 17th, 1806; that their said ancestor Don Juan Filhiol never thereafter parted with his said title to said land.

That the said deed from the said Narcisso Bourgeat to the said
Don Juan Filhiol was filed for record and recorded in the office
12 of the recorder of the parish of Pointe Coupee, in the State of
Louisiana, on the 17th day of July 1806, and that said deed, together with a certificate of recordation, are as follows said deed being in the French language, but here translated into the English language, to-wit:

I, the undersigned Narcisso Bourgeat, retrocede, by these presents to Monsieur Juan Filhiol a piece of land three leagues front and one in depth, situated on the Bayou Darquelon, and one also of a league square, situate at the source of the Hot Water of the Ouachita, the which lands he sold me by deed given before Don Vincente Frenandez Texier commandant at the time at said Ouachita, and which I return to him for the same price and sum which he had

parted with to me, and which he has reimbursed me, and therefore I hold him released, in order that he may enjoy it, appertaining as his right, in behalf of which I have signed at Pointe Coupee the 17th of July, 1806.

NARCISSO BOURGEAT.

I certify that the present retrocession has been made in my presence the same day as that above.

J. POYDRAS,
Judge of the Court, Pointe Coupee.

The plaintiffs further state that at the time said Filhiol executed said deed to the land in question to said Bourgeat, he in accordance with the requirements of the Spanish law, actually produced before Vincente Fernandez Texeiro, and then and there actually delivered to said Bourgeat all his title papers, including the certificate of survey, figurative plan and procès verbal, grant etc., the same having been found to be valid, and when said retrocession was made all the title papers were produced, before the officer by whom the deed was witnessed, and were actually delivered
13 to the said Filhiol.

Plaintiffs further state that their ancestor, the said Don Juan Filhiol, after the retrocession to him of said square league of land, as aforesaid, and after the Indian right of occupancy had been extinguished in 1818, made efforts to render the same available to the valuable uses to which it was and is by nature available, and in the year 1819 effected a lease in writing of the Hot Springs thereon to one Stephen P. Wilson, a doctor of medicine, for a period of five years, with a view to the improvement of the same and the opening of such medicinal waters to public use. That the said lessee, Dr. Wilson, did under said lease enter possession thereof in the year 1819, and made some improvements and continued for some period in such occupation, with the purpose to attract thither those who might be in necessity for the use of such waters for healing. But that not long after, in the year 1821, the plaintiffs' said ancestor, Don Juan Filhiol, died as hereinbefore stated; that the region of country in which said land was situated was remote from settlements, and inaccissible without much difficulty and risk to those who might be benefited by the medic-al properties of the Hot Springs there, and fu-ther efforts to then render them available were for many years impracticable. That since the death of their said ancestor, plaintiffs have always urged their title to the said property and employed agents and attorneys to do so for them, but that during nearly all of this interval they have been embar-assed by the want of the said original grant for said land, the same having without the knowledge of the said heirs of the said Filhiol, been in the hands of one Resin P. Bowie, a distinguished lawyer, who made a specialty of Spanish grants, and who died in 1843. Often and repeated searches were made by the said plaintiffs for said grant, but that they

failed to find it; that lately to-wit: on or about the — day of
14 ——, 1883, said original grant from said Don Estevan Miro, the Spanish governor general, of the province of Louisiana to the *the* said Don Juan Filhiol was found by Mrs. Matilda E. Moore of New Orleans parish, Louisiana, among the effects of her mother, who was the widow of the said Resin P. Bowie and that said grant was delivered by said Matilda E. Moore to Margaret A. Muse, who was a daughter of Narcisso Bourgeat and Marie Barbe Filhiol and a granddaughter of Don Juan Filhiol, in the year 1883; that printed copies of the affidavits of Matilda E. Moore, Ellen M. Coates, and Margaret Adelaide Muse and Hippolite Filhiol, as to the finding and delivery of said original grant and certificate of measurement or survey of the said Carlos Trudeau marked 1, 2, 3, and 4, are attached hereto and filed herewith.

That said Don Juan Filhiol at the time of his death was and for more than forty years theretofore he had been a citizen and inhabitant of the Territory of Louisiana, and by virtue of the several grants and instruments of writing hereinbefore set out the said Don Juan Filhiol has become the owner and at the time of his death was the owner and in possession of a league of land being a tract of about three miles square, embracing all the hot springs in the city of Hot Springs, Garland county, Arkansas, and including a parcel of land for which the plaintiff- bring this suit and which for convenience, is hereinafter designated as the land in controversy the same being described as follows:—

An irregular tract or plot of ground known as the site of the Army and Navy general hospital, upon which, and within the boundaries of which was built and is now standing the building, used and occupied and known as said Army and Navy general hospital, being the lot described on the records of the Interior Department as the site for said hospital in said city of Hot Springs; tha exact deccription by measurement or metes and bounds
15 being to the plaintiffs unknown. That plaintiffs duly applied to the Secretary of the Interior for a copy of the official description of said lot or tract as set out in the records and filed of the Interior Department, which application was refused and denied.

And for cause of action these plaintiffs say that by the third article of the treaty between the United States and the Republic of France, ratified on the 21st day of October, 1803, by which the province of Louisiana was acquired by this Government it was agreed and established that the inhabitants of said province should among other things, "be maintained and protected in the free enjoyment of their * * * property;" that such provision, by a just construction of said treaty extended to the property of the said Don Juan Filhiol, the plaintiffs' ancestor, so as aforesaid granted to him, and also to the rights of these plaintiffs as his heirs in and to the same, and so far forth qualified the rights of property acquired by the United States thereunder; but that, nevertheless denying that these plaintiffs were entitled to be maintained and protected in such enjoyment of their said property by any construction of said

treaty, the United States asserted title to said land by virtue of the general cession of the province of Louisiana, without regard to such exception in the said third article contained, and prior to the commencement of this suit did by their officers and agents, expell the plaintiffs from possession of the said land last above described, which is parcel of the aforesaid grant to their said ancestor, and did deliver over such possession to the defendant in this action some time before the commencement thereof, to wit, on the first day of January, A. D. 1900, and did then establish him in such possession thereof wrongfully and unjustly; that since said date and for more than two years, the said defendant has so remained in possession of said land in controversy claiming the same
16 for the United States as superintendent of the U. S. Army and Navy hospital ousting the plaintiffs and denying their right thereto, by direction of the United States and in pursuance of the unlawful and unjust possession so given by them to him, and without any other right or claim of right thereto, on the part of said defendant except as such superintendent and as a public officer of the United States. And that the cause of action of these plaintiffs against the said defendant arises out of said treaty and draws in question the construction thereof.

And also these plaintiffs say that they were by inheritance from their said ancestor lawfully possessed of the land in controversy, as parcel of said grant to him made as aforesaid, but that the United States did heretofore deprive them of their said property without any process of law, and without any legal right so to do, and did take the same for public use without any compensation to these plaintiffs, and did as aforesaid by their officers and agents expel these plaintiffs from possession of the land in controversy, and before the commencement of this action to-wit: on the first day of January, A. D. 1900, established the defendant in possession thereof wrongfully and unjustly, and so he has since remained as aforesaid pursuant to such acquisition of possession by him, and by direction of the United States, and without other right or claim of right thereto, and has all said time ousted these plaintiffs. And so their cause of action arises under the Constitution of the United States and involves the application thereof for the protection of their just rights.

The land and building in controversy are of the value of fifteen thousand dollars, and the rent thereof, with the buildings thereon, is of the value of two thousand dollars per annum.

Wherefore plaintiffs pray judgment for possession of said land in controversy and for five thousand dollars rent thereof, as
17 damages, and for other relief.

(Signed) W. S. AND F. L. McCAIN, *For Pl'ffs.*

Endorsed: Filed and writs issued August 14th, 1902, W. P. Feild, clerk.

18 EXHIBIT "X."

Sepan quontas esta carta vienen como yo Don Juan Filhiol, capitan de exto y comandante de lilicias de este puerto que otorgo que vendo realment y con efecto d Don Narcisso Bourgeat hierno y vecino de este distrito una tierra de ochenta y quartro arpanes de frente y quaranta y dos de produndidad a cada lado del rio llamado de la "Source de Eau Chaude" distante de su entrada en el del Ouchita como de dos leguas teniendo el manantial de Aquas Calientes par centro corriendo sus limites a la profundidad leste, oeste, paralelas, limitado por ambos lados con tierras realengas, la misma que me pertenence por averla obtenido de consecion del Sor Don Estevan Miro Gebernado de estas provincias entonces, en fechada doce de Diciembre del Uno de Mil Setecientos Ochenta y siete y vela vendo al ante, dicho con todas sus entrados y validos usos costumbras duenos y servidumbres libre todos gravaman e hipoteca en el precio de mil y dos cientos prosos fuertes que me ha pagoda de contado de cuya cantidad me doy por entregado a mi voluntad y por no ser de presente la entrega renuncio la escepion de la non numerata pecunia y ortaga formal recibo, mediante lo qual me aparto y separo del dueno de propriedad posescion utis Dominio y Senoria que a dicha tierra avia y tenia y todo lo cedo renuncio y trapaso en el comparador y en que su causa dueno huvierepor que como proprio suyo la posea venda cambie o enagene a su voluntad por esta escritura que a su favor otorgo en senas de real entrega conto que ha de ser visto aver adquirido su posecion sin que resesite deotra prieva de que lo relevo y me obligo a la evicion seguridad y saneamiento de estra venta en toda forma de Dueno con mis bienes avidos y por a ver doy aqui por incenta la clausa la quarantia y renuncio los leyes de mi favor con la gral en-

19 forma y estando presente al ortogamiento de esta escritura, yo el referido Don Narcisso Bourgeat la acepto a mi favor recibiendo comprada dicha tierra en la cantidad y conformidad que me va vendida de ella me doy—por entregada a mi voluntad, y otorgo formal recibo. En cuyo testimonio es fecha la carta en el Puerto de Ouachita a los veinte y cinco dias del mes de Novienbre del ano Mil Ochocientos y tres yo Don Viz Teru Fejerio Teniente del regimento infanteria de la Louisana y comandante militar y politico de este Puerto y su jurisdicion certifico—conozco a los otorgantes que firmaron siendo testegos de asistencia el so Baron de Bastrop Du Josif Pomet presencia de Don Alexandro Breard, Don Carlos Bettin y Du Francisco Cavet todos de este vecindario entre renglones Cavet—vale bettin—rayado—no vale.

NARCISSO BOURGEAT.

JUAN FILHIOL.

Anto mi Comandante VIZ. FENR. FEJERIO.

BARON DE BASTROP.
Y. POMET.

[SEAL.]

Be it known to all to whom this act may come, that I, Don Juan Filhiol, captain in the army, commandant of the militia of this district, do authenticate that I really and effectually do sell to Narcisso Bourgeat, my son-in-law, and resident of this district, a tract of land with a front of eighty-four arpens, and a depth of forty-two arpens on each side of the stream called "La Source d'ear Chaude" about two leagues distant from its entrance into the Ouachita, having the Hot Springs for its center; its limits extending in parallel lines east and west to it- full depth, and bounded on both sides by lands belonging to the crown the same which belongs to me by virtue of a
20 grant obtained from Senor Don Estevan Miro, the then governor of these provinces, dated the 12th day of December of the year 1787. I sell the same to the above named Bourgeat with all its ways of entrance and exits, uses, stated customs and servitudes, free from all charge and mortgage, for the price of one thousand two hundred dollars, good money, which he has paid me in cash, for which sum I acknowledge receipt and to obviate the actual receipt therefor at this moment, I renounce the exception *nemerata pecunia* and do formally authenticate that I receive it; wherefore I abandon and relinquish all title, possession, use, dominion of seignory I may have had, or held in and to said tract of land and do grant unto and renounce in favor of, and transfer to this purchaser all such title and rights thereto, and in whom such a right and title may be that he may possess, sell exchange alienate according to his own wish, as set forth in this writing which I pass in his favor in testimony of real delivery of said property, so that it may be seen and understood that he acquir-s possession thereof without any proof of which he is hereby relieved, and to secure him against eviction and to insure the reality of this sale, I hereby effect and obligate thereto all the property I now have, or may hereafter have, and do hereby insert the clause of full guaranty, and do renounce all laws in my favor in general and in particular and being present at the passing of this act I, the above named Narcisso Bourgeat accept the same—acknowledging to have purchased the said land in quantity and shape as herein sold to me, which I accept as a delivery and formally acknowledge the possession, in testimony of which this deed is passed in the district of Ouachita on the 25th day of the month of November, one thousand eight hundred and three.

I Don Vincente Fernandez Texiero lieutenant of the regi-
21 ment of infantry of Louisiana and military and civil commander of this district and jurisdiction, certify that I know the contracting parties hereto which act is affirmed by Senor Baron de Bastrop and Don Jose Pomet, who are present and assisting in the

presence of Don Alexander Breard, Don Carlos Betin and Don Francisco Cavet, all of whom are residents of this district.

JUAN FILHIOL.
NARCISSO BOURGEAT.

Done within my jurisdiction.
VINCENTE FERNANDEZ TEXIERO.

BARON DE BASTROP.
TN POMET.

STATE OF LOUISIANA, }
Parish of Ouachita. }

I hereby certify that the above and foregoing is a true and correct copy of the original deed on file and of record in the notarial records of this parish.

Witness my signature and seal of office this 10th day of June, 1889.

(Signed) R. A. YOUNG,
Deputy Clerk Fifth District Court and
[SEAL.] *Ex-officio Recorder and Notary Public.*

22 EXHIBIT "Z."

I the undersigned Narcisso Bourgeat, retroceed by these presents to Monsieur Jean Filhiol a piece of land of three leagues front and one in depth, situated on the Bayou Darquelon; and one also of a league square situate at the source of the Hot Water of the Ouachita, which lands he sold to me by deed given before Don Vincente Fernandez Texario commandant at that time at said Ouachita, and which I return to him for tha same price and sum which he has parted with to me and which he has reimbursed me, and therefore I hold him released in order that he may enjoy it appertaining as his right in belief of which I have signed at Pointe Coupee the 17th day of July, one thousand eight hundred and six.

(Signed) NARCISSO BOURGEAT.

I certify that the presented retrocession has been made in my presence the same day as that above stated.

(Signed) J. POYDRAS,
Judge of the Court of Pointe Coupee.

23 Je soussique Narcisso Bourgeat retorcede par ce presente a Monsieur Jean Filhiol, une terre de trois leines de face une de profondeur, situee sur le Bayou Darquelon; et une idam d'une liene enquarri, situee a la Source d'Eau Chaude au Ouachita les quelles terres il m'a vendu par actepasse pardevant Don Vincent Fernandos Texcico, commandant pu pour lor au dit Ouachita, et que je lui buivavends pour le meme pui et somme quil me les avait

laisse et qu'et qu ma rem bouise at pour quoi je le tiens quotte pour quid en jousse comme d'an lieu a lai appurtenant en foi de quoi ai signe a la Ptr. Coupie la dixept Juillet mil huit cent six.

(Signed) NARCISSO BOURGEAT.

Je certifie que la presente retrocession a ete fait et au gendessus.

(Signed) J. POYDRAS,
Juge du Conte de la Ptr. Coupie.

STATE OF LOUISIANA,
Parish of Pointe Coupee.

I the undersigned clerk and *ex-officio* deputy clerk and recorder of mortgages certify that the foregoing and herewith is a true copy of the original on file and of record in this office which original has been duly recorded in this office on the 17th day of July, 1806 under No. 2607.

Witness my official signature and seal of office, this 1st day of June, 1889.

[SEAL.] (Signed) A. J. DAYINS, *Recorder.*

24 EXHIBIT No. 1.

STATE OF LOUISIANA,
Parish of Orleans.

Mrs. Matilda E. Moore, widow of Joseph H. Moore, of the above parish and State, being duly sworn, deposes and says that she was born at Opelousa, Louisiana, August 15th, 1817, and is a daughter of Resin P. Bowie deceased, who was a land agent versed in the practice and prosecution of Spanish and French land claims.

Deponent further declared that she heard her father and James Fort Muse, husband of Mrs. Margaret A. Muse, one of the heirs of Don Juan Filhiol, speak together about the claim the heirs of said Filhiol have to Hot Springs in Arkansas; that she knows that the said heirs have for many years claimed and attempted to establish their rights to said property. Deponent further declares that her father, Resin P. Bowie, died about the year 1841, and that he left a large number of papers relating to land claims; that after his death, parties applied to her mother, and herself for documents relative to the Hot Springs claim of the Filhiol heirs; that search was made among her father's papers for them, but without success; that the greater part of her father's papers relating to land claims were taken possession of and carried off by one John Wilson who had been interested with her father in the prosecution of land claims, and she was under the impression the Hot Springs papers were among those carried off by Wilson. Deponent further declares that her mother, widow of said Resin P. Bowie, died about August 25th, 1875; that after her death, while looking over her effects, deponent found in an old trunk, containing relics and papers which

had belonged to her mother, she found a package of papers
25 rolled in an old newspaper marked "Papers belonging to Mrs. Bowie," which on examining, she exclaimed, "Why, here are Mrs. Muse's Hot Springs papers." Deponent declares that said package contained the original grant to Don Juan Filhiol by Estevan Miro, a certificate of survey signed Carlos Trudeau and a pen and ink sketch or plat of survey, and other papers. Deponent further declares that she gave said package of papers to Mrs. Mar*agaet* A. Muse, widow of the aforesaid James Fort Muse, some time during the year 1883. Deponent further declares that the pen and ink sketch or plat of survey, which accompanied the papers delivered by her to Mrs. Muse, was similar in appearance to the plats or plans of surveys of French and Spanish grants, and was executed on paper similar in appearance to the paper upon which are written the grants by Miro and the certificate of survey by Trudeau, and was signed by Carlos Trudeau.

(Signed) MATILDA E. MOORE.

Sworn to and subscribed to before me this 20th day of September 1889, A. D.

[SEAL.] FRANK HERBERT,
Notary Public.

EXHIBIT No. 1½.

STATE OF LOUISIANA, }
Parish of Orleans. }

MRS. Matilda E. Moore, widow a resident of the above parish and State, being duly sworn, deposes and says she has sufficient knowledge of the Spanish language to know the purport of a grant written in that language, and that she is familiar with the form and appearance of land grants made by the French and Spanish governments, having seen a number of them in the possession of her father while he was engaged in attending to land claims.

(Signed) MATILDA E. MOORE.

26 Sworn to and subscribed before me this 5th day of October, 1889.

[SEAL.] FRANK HERBERT,
Notary Public.

EXHIBIT No. 2.

STATE OF LOUISIANA, }
Parish of Orleans. }

Mrs. Ellen M. Coates, widow, a resident of the city of New Orleans, being duly sworn, deposes and says she is a daughter of James Fort Muse and Margaret A. Bourgeat, and a great grand-daughter of Don Juan Filhiol, who was commandant of the post of Ouachita from 1783 to 1800, and to whom Don Estevan Miro, governor of the province of Louisiana, made a grant in 1788 of a league square of

land in the district of Arkansas, so as to include the Hot Springs. Deponent further declares that Don Juan Filhiol and his heirs, after his death in 1821, always claimed said lands as theirs under the aforesaid grant. That for more than fifty years the heirs have made continual efforts to obtain possession of said property and to establish their rights, employing skilled agents and attorneys for that purpose, among other agents, one Resin P. Bowie, who died about the year 1841. Deponent further declares that the original grant papers for the aforesaid property were mislaid or suppressed until the year 1883, when one Mrs. Matilda E. Moore, a widow, a resident of the city of New Orleans, and a daughter of the aforesaid Resin P. Bowie, delivered to deponent's mother Mrs. Margaret A. Muse, the said grant papers, saying she had found them in an old trunk in which her mother, widow of the said Bowie, had kept her private and family relics. Deponent further declares that the claim of the Filhiol heirs is based on a complete grant; that up to the year 1870 the claimants for lands in Arkansas under complete grants had
27 no way of proceeding against the United States, either in court or before the Land Department, as allowed in other States by divers acts of Congress but that by act of Congress approved June 11, 1870, entitled "An act in relation to the Hot Springs reservation in Arkansas," but ninety days were allowed claimants in which to file suits in the Court of Claims, while in other States years were allowed; that during the time allowed by the aforesaid act one Thomas S. Drew of Arkansas, was the agent of the heirs of Filhiol; that he obtained many documents and papers relating to their claim from them, but he failed either to file suit in the Court of Claims or to bring their claim to the notice of Congress; that without notice to the heirs, he summarily abandoned their case, and they have never been able to recover the papers placed in his hands, he having left Arkansas; that after his defection, and after the expiration of the time allowed by the aforesaid act, in October, 1873 the claim was placed in the hands of Judge W. J. Q. Baker, of Monroe, who after taking a large amount of testimony and attempting to obtain legislative action by Congress, which he asserted was prevented by the opposition of the suitors for the same property, then in the Court of Claims and the expiration of the session of Congress, either abandoned the case or died while prosecuting it.

Deponent further declares that since the recovery of the original grant papers in 1883, the want of which has always been asserted to be the stumbling block in establishing the claim, she has been acting for her mother, whose great age has prevented her taking any active part in attending to this claim, and has made every effort to procure the necessary legal assistance to prosecute it; that she has submitted the papers to several lawyers for examination, with the view of placing the claim in their hands for prosecution, but on account of her moderate means, without success until
28 the present year; that the numerous heirs of Don Juan Filhiol are scattered in Louisiana, Mississippi, Texas, and Mexico;

that the necessity of unity of action on their part, the great distance seperating them and the difficulty in communicating with them, together with the lack of means to obtain legal assistance, has caused the apparent delay in the application for relief, and it was only in the present year that her present attorney informed her that the *Congress* of the United States would grant the heirs upon a proper showing the same facilities allowed to other claimants to prosecute their rights in the courts of the country.

ELLEN M. COATES.

Subscribed and sworn to before me this 19th day of September A. D. 1889.

[SEAL.] FRANK HERBERT,
Notary Public.

29 EXHIBIT No. 3.

STATE OF LOUISIANA, }
Parish of Orleans. }

Mrs. Margaret Adelaide Muse widow, of the above parish and State being duly sworn deposes and says that she was born December 5th, 1803, and is the daughter of Narcisso Bourgeat and Marie Barbe Filhiol, and a grand-daughter of Don *F*uan Filhiol, who was Spanish commandant of the post of Ouachita from 1783 to 1800, and to whom Don Estevan Miro, governor of the province of Louisiana, on Feburary 22nd, 1788 made a grant of a league square of land in the district of Arkansas so as to include the Hot Springs; that she married James Fort Muse, a lawyer February 22nd, 1821, and that he died January 14th, 1843. Deponent further declar-s that in 1803 he- grandfather, Don Juan Filhiol, sold the tract of land granted as above to her father, Narcisso Bourgeat; that in 1806 Narcisso Bourgeat retroceded the same land to Don Juan Filhiol; deponent further declares that the original grant papers to the aforesaid land were lost to the Filhiol heirs until a few years since, when Mrs. Matilda E. Moore, a resident of the city of New Orleans, widow and a daughter of one Resin P. Bowie, who, about the year 1840, had been employed by the Filhiol heirs to prosecute and establish their title to the above land, delivered to deponent the original Spanish grant of Don Estevan Miro and the cirtificate of survey of Don Carlos Trudeau, royal surveyor of the province of Louisiana showing a survey by him of the league square of land granted above so as to include the Hot Springs in Arkansas, saying she had found them in an old trunk which had not been opened for years, among other relics of her mother, deceased wife of the aforesaid Resin P. Bowie. Deponent further de-
30 clares, that prior to the recovery of the original grant papers aforesaid, she and the other heirs had used due diligence in prosecuting their rights under said Spanish grant, and had agents and attorneys employed continuously for that purpose for more than fifty years. Deponent declares that the documents handed to her

by the aforesaid widow Moore consisted of the original grant, the certificate of Trudeau, royal surveyor and a pen and ink sketch or plat of survey and other papers. Deponent further declares that, owing to her great age, she is unable to take any active steps in pushing the claim for the aforesaid lands, and has put the papers in the hands of her daughter, Mrs. Ellen Muse Coates, of New Orleans for that purpose.

(Signed) MARGARET A. MUSE.

Subscribed to and sworn before me this 20th day of September, 1889.

[SEAL.] FRANK HERBERT,
Notary Public.

EXHIBIT No. 4.

STATE OF LOUISIANA, }
Parish of Ouachita. }

Hippolite Filhiol of the above parish and State, being duly sworn, deposes and says that he is a son of Edmond Landry Grammount Filhiol and a grandson of Juan or Jean Filhiol who was Spanish commandant of the post of Ouachita from 1782 to 1800, and to whom was granted by Don Estevan Miro, governor of the province of Louisiana in 1788, a tract of land one league square so as to include the Hot Springs in the district of Arkansas. Deponent declares that the said grant papers to said land were lost or
31 mislaid for several years; that since the death of Don Juan Filhiol in 1821 his heirs have made repeated and continued efforts to substantiate their claims to said land, having employed numerous lawyers and agents versed in the land laws and practice to prosecute it, but owing to the loss of the original grant papers, their said agents have never been able to prosecute their claim to a finality; that these agents, after investigating this claim and obtaining all the supporting evidence in the possession of the heirs, have one after the other abandoned its prosecution for want of the original grant papers from the Spanish government, and that many of the documents placed in the hands of these agents supporting their tittle the heirs have never been able to recover; that since the expiration of the time allowed by the act of Congress for the instituting of proceedings for the Hot Springs, entitled "An act in relation to the Hot Springs reservation in Arkansas," approved June 11th, 1870, (U. S. Stats., vol. 16, p. 149). Deponent is informed that Mrs. M. A. Muse, one of the heirs of said Don Juan Filhiol, has recovered the original grant papers to Don Juan Filhiol which will enable his heirs to substantiate and establish their claim to the said tract of land.

(Signed) H. FILHIOL.

Sworn to and subscribed before me this 6th day of September, 1889.

(Signed) ROB'T RAY,
[SEAL.] *U. S. Commissioner.*

32 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered, that at a circuit court of the United States of America, in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 7th day of April anno Domini, one thousand nine hundred and two at the United States court room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber U. S. district judge presiding and holding said court, the following proceedings were had, to-wit:

Before the clerk in vacation, September 1st, 1902.

HIPPOLITE FILHIOL ET AL.
vs. 5224.
GEORGE H. TORNEY.

Comes the defendant by William G. Whipple Esq., district attorney and files herein his demurrer to complaint.

Which demurrer to the complaint is in the words and figures following to-wit:—

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY.

Now comes the said defendant George H. Torney by William G. Whipple Esq., United States attorney, and demurs to the complaint filed *filed* herein and for cause of demurrer states that it appears upon the face of said complaint:

First. That the court has no jurisdiction of the subject of this action.

Second. That the complainant does not state facts sufficient
33 to constitute a cause of action.

(Signed) WILLIAM G. WHIPPLE,
United States Attorney.

Endorsed: Filed September 1st, 1902. W. P. Feild, clerk.

34 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered, that at a circuit court of the United States of America, in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 20th day of October anno Domini, one thousand nine hundred and two at the United

States court room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber, U. S. district judge presiding and holding said court, the following proceedings were had, to-wit: on December 5th, 1902.

HIPPOLITE FILHIOL
vs.
GEORGE H. TORNEY. } 5224.

Comes the plaintiff by *by* W. S. and F. L. McCain Esqs., his attorneys and comes the defendant by William G. Whipple Esq., district attorney and it is ordered by the court that the demurrer heretofore filed be set down for hearing for December 15th, 1902, and the clerk is directed to notify the parties of the court's action herein.

And on December 15th, 1902 the following proceedings were had towit:

HIPPOLITE FILHIOL
vs.
GEORGE H. TORNEY. } 5224.

Comes the plaintiff by W. S. and F. L. McCain Esqs., his attorney- and comes the defendant by William G. Whipple Esq., his attorney and by agreement of parties it is ordered that the argument of the demurrer which was set down for this date, be continued to January 5th, 1903.

35 And on December 31st, 1902, the following proceedings were had to wit:

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY. } 5224.

Comes the defendant by William G. Whipple Esq., United States attorney and by leave of court files herein his answer to complaint and exceptions to exhibits.

Which answer and exceptions are as follows:

36 In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL, FRANCIS J. WATTS, HARRIET L. WATKINS, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette W. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse, by Their Mother and Next Friend, All Residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, Margaret A. Horton Campbell, All Residents of the State of Texas; Lizzie S. Cochran, Robert R. Sanford, and Charles C. Sanford, Residents of the State of Mississippi; Mary A. Bres, Resident of the State of Illinois; Ellen M. Parker, Resident of the State of California; George B. Muse and Mary L. Muse, Residents of the State of Minnesota; Malvina R. Muse Bowman, Resident of the State of Wisconsin; Bessie Muse, Resident of the State of Iowa; James Fort Muse, Resident of the State of Oregon; Mary E. Behen, Resident of the State of Missouri; Alice F. South, Resident of Mexico, and Victoria A. Horton Bartholomew, Now Mrs. J. D. A. Harris, Resident of the State of Washington; Frederick Horton and Joseph E. J. Muse, Residence Unknown, Plaintiffs,

vs.

GEORGE H. TORNEY, Defendant.

Answer to Complaint at Law.

Now comes George H. Torney, the defendant in the above-entitled suit, by William G. Whipple, Esq., United States attorney,
37 duly authorized to appear herein for said defendant by Hon. H. M. Hoyt, acting Attorney General of the United States, by letter of instructions dated August 29th, 1902, a copy of which letter is hereto annexed, marked "Exhibit A," and makes answer to the complaint of the said plaintiffs, Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette W. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, Eugene and Cecil Muse by their mother and next friend Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, Margaret A. Horton Campbell, Lizzie S. Cochran, Robert R. Sanford, Charles C. Sanford, Mary A. Bres, Ellen M. Parker, George B. Muse, Mary L. Muse, Malvina R. Muse Bowman, Bessie Muse, James Fort Muse, Mary E. Behen, Alice F. South, Victoria A. Horton Bartholomew, now Mrs. J. D. A. Harris, Fredrick Horton and Joseph E. J. Muse, in the above-entitled suit named, and for answer thereto says:

That as to whether the said Don Juan Filhiol was a citizen and resident of the State of Louisiana in the year 1821; and as to whether

he died intestate; and as to whether the said other plaintiffs herein are citizens of the United States or are descendants of the said Filhiol or his only descendants and heirs; and as to whether each and every one of the descendants of the said Filhiol who are dead died intestate so far as the lands described in said complaint are concerned; and as to whether said Fil-
38 hiol was born in the year 1740; and as to whether he ever settled in Louisiana or when he did so; and as to whether he was appointed by the King of Spain or any other official a captain in the army of the King of Spain or a commandant of his militia and was assigned to duty at the post of Ouachita, Louisiana, under Don Estevan Miro as governor general of the province of Louisiana; and as to whether during the years from 1783 to 1789, inclusive, said Don Estevan Miro was the governor general of the province of Louisiana under and by authority of the King of Spain and was by the King of Spain duly authorized to represent the said king as his regent and governor to do such acts and make such grants of land in the said province as the king himself might do and make; and as to whether during the same period one Don Carlos Trudeau was the royal surveyor general of said province, appointed by the said king and vested with the powers appertaining to such office by the laws of Spain; and as to whether said Miro and said Trudeau, as such officers, respectively, were duly authorized to perform all the acts stated in said complaint to have been done by them respectively; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

That as to whether on the 12th of December, 1787, or at any other time, said Don Juan Filhiol memorialized the governor of the province of Louisiana and West Florida for a grant of land; and as to whether the said governor ordered the land applied for to be
39 surveyed; and as to whether Don Carlos Trudeau, as surveyor general of the said province, ever made a survey of said land before the 22nd day of February, 1788, or at any other time, in accordance with the existing law, or otherwise; and as to whether he made a report thereof, with figurative plan, procès verbal or certificate of description of the land to be granted, in and by which the said land was described as set forth in said complaint, or otherwise; and as to whether upon the report of said surveyor general and said figurative plan, procès verbal or certificate of description made and returned to him the said Governor Don Estevan Miro, in his capacity as representative of the King of Spain, or in any other capacity, did then make and deliver to the said Don Juan Filhiol a royal grant for a certain league of land represented on said figurative plan and described in said procès verbal or certificate of description by said surveyor general; and as to whether such royal grant is now in the possession of said plaintiffs; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

That as to whether the said grant of land as alleged in said com-

plaint was made to said Don Juan Filhiol while he was acting as commandant of the post of Ouachita as a reward for his civil and military services, or for distinguished services by him rendered to the King of Spain; and as to whether the said Don Estevan Miro, as said alleged governor general of Louisiana, was by the Spanish laws vested with the power to make said grant and to convey by
40 said grant the absolute fee simple to the land thus granted; and as to whether said land so granted by the said Don Estevan Miro, as governor, to the said Don Juan Filhiol consisted of a certain one square league of land with the hot springs at the city of Hot Springs in the county of Garland and State of Arkansas aforesaid as the center of said league; and as to whether such pretended grant of land conveyed to said Don Juan Filhiol is definite and certain and applicable to the land described so as to identify the same; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

And this defendant, further answering, denies that the pretended grant as set forth in said complaint in the Spanish language, together with a translation thereof in the English language, is a true and genuine grant of the land therein described, or that the said pretended grant is a lawful conveyance of any kind from Don Estevan Miro to Don Juan Filhiol.

And this defendant further denies that by said pretended grant the said Don Juan Filhiol was duly and fully vested with an absolute title to the tract of land one league square described therein.

And this defendant further denies that on the 6th day of December, 1788, or at any other time, one Carlos Trudeau, as a royal special surveyor of the province of Louisiana, made, executed and delivered a certificate of survey of said pretended grant of land to said Don Juan Filhiol, as set forth in said complaint in the
41 Spanish language together with a translation thereof in the English language.

And this defendant further denies that by the making and delivering of such certificate by the said Trudeau, judicial possession of said land was delivered and that the same had the force and effect of segregating said tract from the public domain and to vest a full and complete title thereto in said grantee.

And this defendant further says that as to whether any survey, figurative plan or procès verbal made by the said Trudeau as surveyor general have become lost or destroyed, he has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

And this defendant, further answering, says that as to whether in the year 1799, or at any other time, one Morales was governor of the said province of Louisiana by appointment of the King of Spain, or otherwise; and as to whether on said day in the exercise of the royal authority, or otherwise, he made and promulgated a regulation of law to govern the future conveyances of land in the said province by the subjects of the King of Spain, a pretended copy of

which is set forth in said complaint, or any other regulation of law on the subject, he has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

Defendant further says that as to whether the said Don Juan Filhiol did sell or convey said league of land described in
42 said complaint to his son-in-law Narcisso Bourgeat on the 25th day of November, 1803, or at any other time; and as to whether said deed from said Don Juan Filhiol to said Bourgeat was passed before Don Vinciente Fernandez Texiero as lieutenant of the regiment of infantry and military and civil commandant of the district of Ouachita; and as to whether said deed was witnessed by Senior Baron d'Bastrop and Don Jose Pomet; and as to whether said witnesses signed the act in the presence of Don Allex Breard, Don Carlos Bettien or Don Francisco Cavet, the said pretended deed being set forth in said complaint in an English translation; and as to whether said deed was thereafter reported in the proper office of the province of Louisiana in accordance with law, or otherwise, and was afterwards duly recorded in said office; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

That as to whether the said Narcisso Bourgeat ever retroceded the same land so alleged in said complaint as being sold to him by the said Don Juan Filhiol to the said Don Juan Filhiol by deed passed before J. Poydras as judge of the court of the parish of Pointe Coupee on the 17th of July, 1806, or at any other time; and as to whether said Don Juan Filhiol ever thereafter parted with his title to said land; and as to whether the said pretended deed from *from* the said Narcisso Bourgeat to the said Don Juan Filhiol was filed for record or recorded in the office of the recorder of the parish of Pointe Coupee in the State of Louisiana on the 17th day of July, 1806, or at
43 any other time, said pretended deed being set forth in said complaint in an English translation; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

That as to whether at the time said Filhiol executed said pretended deed to said Bourgeat, he, according to the requirements of the Spanish law, or otherwise, produced before Vinciente Fernandez Texiero, or then and there delivered to said Bourgeat, all his title papers, including the certificate of survey, figurative plan, procès verbal, grant, etc., and as to whether the same had been found to be valid; and as to whether when said retrocession was made all the title papers were produced before the officer by whom the pretended deed was witnessed and were actually delivered to the said Filhiol; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

That as to whether the said Don Juan Filhiol after the alleged retrocession to him of said square league of land and after the Indian right of occupancy had been extinguished in 1818, made efforts to render the same available to the use to which it was by nature adapted; and as to whether in the year 1819 he effected the lease in

writing of the hot springs thereon to one Stephen P. Wilson for a period of five years, or any other period, with a view to the improvement of the same and the opening of such medicinal waters to public use, or any other purpose; and as to whether the said lessee,
44 Dr. Wilson, entered into possession under said lease in the year 1819 or made improvements or continued for some period in such occupation for the purpose of attracting thither those who might to desire to use such waters for healing; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

That as to whether in the year 1821, or at any other time, said Don Juan Filhiol died; and as to whether further efforts to render said springs available were for many years impracticable, this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

And this defendant, further answering, denies that since the death of the said ancestor said plaintiffs have always alleged their title to said property and employed agents and attorneys to do so for them.

That as to whether said plaintiffs have during nearly all of this interval been embarrassed by the want of the said pretended original grant to said land; and as to whether the same had been without the knowledge of the said heirs of the said Filhiol in the hands of one Resin P. Bowie, a lawyer who made a specialty of Spanish grants; and as to whether said Bowie died in 1843; and as to whether the said plaintiffs made repeated searches for said grant, failing to find it; and as to whether in 1883, or at any other time, said original pretended grant from said Don Estevan Miro to the said Don Juan Filhiol was found by Mrs. Matilda E. Moore of New
45 Orleans parish, Louisiana, among the effects of her mother, or elsewhere, and as to whether said grant was delivered by said Matilda E. Moore to Margaret A. Muse, a daughter of Narcisso Bourgeat, and Marie Barhe Filhiol, a granddaughter of Don Juan Filhiol, in the year 1883, or at any other time; this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

And this defendant, further answering, denies that the said Don Juan Filhiol at the time of his pretended death, or at any other time, by virtue of the said several grants and instruments of writing, or otherwise, had ever become the owner, or at the time of his pretended death was the owner, or in possession, of a league of land, being a tract about three miles square embracing all the hot springs in the city of Hot Springs, Garland county, Arkansas, said parcel of land being more particularly described in said complaint.

That as to whether said plaintiffs duly applied to the Secretary of the Interior for a copy of the official description of said lot or tract as set out in the records and files of the Interior Department; and as to whether said application was refused, this defendant has no knowledge or information sufficient to form a belief, therefore denies the same and calls for proof thereon.

And this defendant, further answering, denies that the provision

of the third article of the treaty between the United States and the Republic of France, signed on the 21st day of October, 1803, and referred to in the said complaint, extended to the property of
46 the said Don Juan Filhiol or the rights of the said plaintiffs as his heirs in and to the same, or that it qualified the rights of property acquired by the United States thereunder.

And this defendant, further answering, admits that the United States has heretofore asserted title to the said land described in said complaint by virtue of the general cession of the province of Louisiana, and did, prior to the commencement of this suit, deliver over possession of the land in question to this defendant and establish him in such possession; but denies that the said possession is either wrongful or unjust.

And this defendant, further answering, denies that the said plaintiffs, or any of them, are by inheritance from their said ancestor lawfully possessed of the land in controversy, and denies that the United States has ever deprived them of their said property.

And this defendant, further answering, herein files exceptions to the said pretended grant in controversy by Estevan Miro to Don Juan Filhiol, and for ground of exception states, that the said pretended grant is not a true and genuine document but is a false, fabricated and counterfeited instrument, and at the date of the said pretended instrument said Estevan Miro had no authority of law to make and execute such grant and never did in fact sign his name to said instrument.

That said grant does not purport to be official or to come from any official depository; that the said grant, in as much as it fails to set forth the description of the land therein conveyed with
47 legal and sufficient distinctness, is void for uncertainty; and this defendant herein files exceptions to the pretended certificate of survey set forth in said complaint, and for ground of exception alleges: that the said document does not purport to come from any official custody or to be an official paper; that the said pretended certificate is false and fabricated and that the said Carlos Trudeau had no authority of law at the date of said pretended certificate to make the same, and never did in point of fact make such certificate; that said pretended certificate shows no such survey as is required by law, in as much as it sets forth no actual survey made upon the ground by metes and bounds, together with field notes and plat, or that such actual survey was duly certified, approved and recorded in the proper office; that the said pretended certificate does not show that the pretended grantee was ever placed in actual, pedal possession of the land described.

And this defendant, further answering, herein files exceptions to the pretended conveyance from Don Juan Filhiol to Narcisso Bourgeat, described in said complaint, and for ground of exception avers: that the said pretended document is not a true and genuine one, but is falsely fabricated and never was in point of fact executed by the said Don Juan Filhiol in the presence of the alleged witnesses, or otherwise; that the description of the land in the said pretended deed

differs essentially from the description of the land conveyed in the said pretended grant.

And this defendant further answering herein files exceptions to the pretended deed from Narcisso Bourgeat to Don Juan Filhiol, described in the said complaint, and for ground of exception alleges: that the said pretended conveyance is false and forged and that the description of the land contained in said deed differs essentially from that described in said pretended grant.

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And this defendant, further answering, avers that the said papers and documents set forth in said complaint set forth no right or title, legal or equitable, in the said plaintiffs, or any of them, to the land and property claimed by them in said complaint, and if genuine the said papers would clothe the said plaintiffs with a mere naked authority or permission.

And this defendant, further answering, alleges that the right and title of the said plaintiffs to the land in controversy herein utterly fails for the reason that the said pretended grant is void for uncertainty in description, and for the further reason that the complaint fails to set forth any actual survey by metes and bounds of the land and property in question, and for the further reason that said complaint fails to show that the plaintiffs, or their predecessors in title, or either of them, were ever put in actual, pedal possession of the land in controversy.

And this defendant denies that the alleged cause of action of the said plaintiffs against said defendant arises out of the said treaty or draws in question the construction thereof.

And this defendant further denies that the alleged cause of action of the said plaintiffs arises under the Constitution of the United States or involves the application thereof for the protection of their just rights.

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Second. And this defendant, further answering, says that the said plaintiffs cannot maintain their said claim, for the reason that said claim was barred by the act of Congress, approved May 26th, 1824, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims;" (4th Statute- at Large, 52 chapter, 173); and the acts amendatory thereof, including the act of June 17th, 1844 (5th Statutes, 676); the said plaintiffs not having complied with the said acts in instituting proceedings within the period required thereby.

Third. And this defendant, further answering, says that the said plaintiffs cannot maintain their said claim, for the further reason that the said claim is barred by the act of Congress, known as the "Hot Springs act," of June 11th, 1875, (16th Statutes at Large, 149 chapter, 126), in as much as the said plaintiffs have failed to institute proceedings within the period and as required by said act.

Fourth. And this defendant, further answering, says that the issues involved in this case are in this court *re- adjudicata*, for the reason that prior to the commencement of this action an action was brought in this court by Margaret A. Muse, *et al.*, *vs.* The Arlington Hotel

Company, involving the title and possession to a parcel of the
50 same land described in and covered by the pretended grant and conveyance set up in this cause, in which cause it became material and necessary to inquire whether said grant and conveyance to said Don Juan Filhiol was legal and valid, which said issue was by this court therein decided adversely to said claim, this court therein deciding that said grant and conveyance was ineffectual to pass title to said lands, or any of them, to said Filhiol, or either of said plaintiffs, and was null and void.

Fifth. And this defendant, further answering, says that the issues involved in this cause are in this court *re-adjudicata*, for the further reason that prior to the commencement of this action an action was brought in this court by Hippolite Filhiol, *et al.*, *vs.* Charles A. Maurice, *et al.*, involving title and possession to a portion of the same lands described in and covered by the pretended grant and conveyance set up in this cause, in which cause it became material and necessary to inquire whether said grant and conveyance to said Don Juan Filhiol was legal and valid, which said issue was by this court therein decided adversely to said claim, this court therein deciding that said grant and conveyance was ineffectual to pass title to said lands, or any of them, to said Filhiol, or either of said plaintiffs, and was null and void.

Sixth. And this defendant, further answering, alleges that the United States of America, whose officer and agent he is, has now been in possession of the property in question under a claim
51 of title and in good faith and believing itself the absolute owner thereof in fee simple for a long period, and while so holding said property in good faith has made valuable improvements thereon, to-wit: to the amount of one hundred thousand dollars ($100,000.00), said improvements consisting of substantial buildings and betterments.

Seventh. And this defendant, further answering, says that this action can in nowise be maintained or prosecuted by the said plaintiffs, or any of them, for the reason that their right of entry upon said land in controversy, if it ever existed, accrued more than seven (7) years before the commencement of this suit, and that this defendant, and his predecessors in title to the lands in controversy, have been in possession of the said premises ever since about the year 1810, and that ever since the extinguishment of the Indian title to said land on August 24th, 1818, said possession has been actual, exclusive, adverse and continuous; and that on or before the year 1883 the United States of America, whose officer and agent this defendant is, he being a major in the Army of the United States and commandant of the Army and Navy general hospital established and maintained by the United States upon the land in controversy, has been in actual, exclusive, open, notorious, hostile and continuous possession of said land, having said premises and all of them wholly inclosed during the whole of said period and having constructed thereon a massive structure designed and used as a hospital for the Army and Navy of the United States.

52 Eighth. And this defendant, further answering, alleges that said plaintiffs having failed for one hundred and fourteen (114) years to enforce their pretended claims, as set forth in the said complaint, are guilty of legal and inexcusable laches and have legally abandoned their said claims.

Ninth. And this defendant, further answering, says that the said United States having made valuable and expensive improvements upon said premises, as hereinbefore set forth, under claim of title to the said land in controversy and having exercised acts of ownership over the same, and the said plaintiffs having stood by while said improvements were being made and said acts of ownership were being exercised, making no protest and impliedly consenting thereto, are estopped from now claiming title to the premises in question.

Tenth. And this defendant, further answering, alleges that this court has no jurisdiction over this action, for the reason that the said complaint does not set forth facts sufficient to constitute a cause of action, in that the jurisdiction of this court is invoked wholly on the ground that the construction or application of the Constitution of the United States or the construction or validity of the said treaty is involved; whereas, in truth and in fact, neither of said instruments is in any way involved herein: and for the further reason that this suit is in substance and effect a suit brought by the plaintiffs against the United States of America, which is a sovereign nation.

53 And this defendant, further answering, says that by the treaty of session entered into April 30th, 1803, and ratified October 21st, 1803, between the Republic of France and the United States of America, known as the Louisiana Purchase treaty, the Republic of France, being at the date of said treaty the absolute owner of the premises here in controversy, conveyed the same to the United States of America, and that the latter has ever since been the sole and absolute owner in fee simple of said property and has for more than thirty (30) years now last past been in sole and actual possession thereof and is now the owner and in possession of the same; and that, therefore, this action being brought against a military officer of the United States and being in legal effect a suit against the United States, this court has no jurisdiction to hear and determine the same.

Wherefore, this defendant prays judgment, that this action may be dismissed at the cost of the plaintiffs, and that in case the plaintiffs should recover a judgment herein for the property in question the United States may have judgment for the value of its betterments thereon, as hereinbefore set forth.

WM. G. WHIPPLE,
United States Attorney.

54 "EXHIBIT 'A.'"

J. M. B. DEPARTMENT OF JUSTICE, J. C. M.
WASHINGTON, D. C., *August* 29, 1902.

William G. Whipple, Esq., United States attorney, Little Rock, Ark.

SIR: I transmit herewith copy of a letter from the acting Secretary of War, together with its enclosures, with reference to a complaint filed in your district against an officer of the United States Army in his official capacity, and affecting the interests of the Government.

You are instructed to appear for the defendant, and defend the interests of the United States.

You will report your action in the matter to this department.

Respectfully,

(Signed) H. M. HOYT,
Acting Attorney General.

Endorsed: Filed December 31, 1902. W. P. Feild, clerk.

55 And on January 2nd, 1903 the following proceedings were had to-wit:

HIPPOLITE FILHIOL ET AL.
vs. } 5224.
GEORGE H. TORNEY.

Comes the defendant George H. Torney by William G. Whipple Esq., United States attorney and by leave of court files herein his amended and substituted demurrer to complaint.

Which amended and substituted demurrer is as follows:—

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL
vs. }
GEORGE H. TORNEY.

Now comes the defendant George H. Torney by William G. Whipple Esq., United States attorney, duly authorized to appear herein for said defendant by the Attorney General of the United States, by letters of instructions, dated August 29th, 1902, a copy of which letter is annexed to the answer to the complaint of the said defendant heretofore filed herein; and files his amended and substituted demurrer to the said complaint, and for cause of demurrer states:

That it appears upon the face of said complaint:—

First. That the court has no jurisdiction over the person of the defendant;

Second. That the court has no jurisdiction over the subject matter of the action.

Third. That the complaint does not state facts sufficient to constitute a cause of action.

(Signed) WILLIAM G. WHIPPLE,
United States Attorney.

56 And on January 5th, 1903 the following proceedings were had to-wit:—

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY. } 5224.

Come the plaintiffs by W. S. and F. L. McCain Esqs., their attorneys and comes the defendant by William G. Whipple Esq., United States attorney and defendant's demurrer to complaint hereto-fore set down for hearing on this date coming on for hearing and the parties not being ready for said hearing the same is continued until January 10th next.

And on January 10th, 1903, the following proceedings were had to wit:—

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY. } 5224.

Come the plaintiffs by W. S. and F. L. McCain Esqs., their attorneys, and comes the defendant by William G. Whipple Esq., United States attorney and the demurrer and amended and substituted demurrer to complaint now coming on for hearing *and* the same *was* argued by counsel, and the court not being now well and sufficiently advised as to what judgment to render therein takes the same under advisement.

And on January 12th, 1903 the following proceedings were had to-wit:

HIPPOLITE FILHIOL
vs.
GEORGE H. TORNEY. } 5224.

Come the plaintiffs by W. S. and F. L. McCain Esqs., their attorneys and comes the defendant by William G. Whipple Esq.,
57 United States attorney and the court being now well and sufficiently advised of the matters arising on the demurrer and the substituted demurrer, argued and submitted at a previous day of this term, considers that the same be sustained:

It is therefore considered, ordered and adjudged that said demurrer to the jurisdiction of this court be and the same is hereby sustained and that the complaint of plaintiff be dismissed.

The following opinion of the court was delivered on said demurrer:

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY.

This is the third action of ejectment brought by the plaintiffs in this cause to recover the premises in Hot Springs Arkansas, known as the Government reservation, including the hot springs and the Army and Navy Hospital of the United States. The demurrers to the complaints in both of the former actions were sustained by the court. In the first case, Muse *vs.* Arlington Hotel Company, 68 Fed. 637, the demurrer was to the merits of the case, but when removed to the Supreme Court by writ of error, the cause was there dismissed for want of jurisdiction of that court, because there was no Federal question involved. Muse *vs.* Arlington Hotel Company, 168 U. S. 430. The second action was by the Supreme Court reversed with directions to this court to dismiss it for want of jurisdiction. Filhiol *vs.* Maurice, 185 U. S. 108. And thereupon this action was instituted.

The complaint does not allege that there is a diversity of citizenship between the plaintiffs and the defendant, but relies for jurisdiction on the fact that the plaintiffs' rights arise under the
58 treaty with France for the purchase of the Louisiana territory and under the fifth amendment of the Constitution of the United States. The property involved in this action includes the Army and Navy Hospital of the United States, of which the defendants is in charge under the direction of the Government. The defendant demurs to the jurisdiction of the court.

Dan W. Jones and W. S. McCain for plaintiffs;
William G. Whipple, U. S. attorney for defendant.

TRIEBER, *District Judge:*

The allegations of the complaint as to the rights of plaintiffs under the tr-aty with France are practically the same as were those in the former cases and which the Supreme Court held were insufficient to confer jurisdiction on a national court, and in the last case directed a dismissal of the cause for want of jurisdiction. Filhiol *vs.* Maurice 185 U. S. 108. There can, therefore, be no jurisdiction on that gruond.

Does the complaint show that the cause arose under the fifth amendment to the Constitution prohibiting the exercise of Federal power to deprive any person of property without due process of law or to take private property for the public use without just compensation?

The complaint is an ordinary action of ejectment for the recovery of real estate in the State of Arkansas. The statutes of that State regualting the proceedings in ejectment are as follows:

"SECTION 2578. In all actions for the recovery of land, except

in actions of forcible entry and unlawful detainer, the plaintiff shall set forth in his complaint all deed- and other written evidences of title on which he relies for the maintenance of his suit, and shall file copies of the same as far as they can be obtained, as exhibits therewith, and shall state such facts as shall show a *prima facie* title in himself to the land in controversy, and the defendant in his answer shall plead in the same manner as above required from the plaintiff."

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"SECTION 2579. The defendant in his answer shall set forth exceptions to any of said documentary evidence, relied on by the plaintiff to which he may wish to object, which exceptions shall specifically note the objections taken, and the plaintiff shall in like manner, within three days after the filing of the answer, unless longer time is given by the court, file like exceptions to any documentary evidence exhibited by the defendant, and all such exceptions shall be passed on by the court, and shall be sustained or overruled, as the law may require; and if any exception is sustained to any such evidence the same shall not be used on the trial, unless the defect for which the exception is taken shall be covered by amendment."

"SECTION 2580. All objections to such evidence not specifically pointed out in the manner provided above shall be waived."

"SECTION 2581. To entitle the plaintiff to recover, it shall be sufficient for him to show that at the time of the commencement of the action, the defendant was in the possession of the premises claimed, and that the plaintiff had title thereto, or had the right to the possession thereof."

Had the plaintiffs followed this statute, merely setting up their evidence of title, the complaint would not show any jurisdiction; but in order to make such a showing they add that defendant is in possession by direction of the Government, thus adding to the complaint something not required by the statute, but which might have been set up for a defense by defendant's answer. Plaintiffs' rights depend solely upon the strength of *his* own title, the grant from the Spanish crown, and the only object in setting up defendant's right or claim or right to possession is to inject a Federal question into the case by intimating that the defendant will interpose as a defense an act violative of the national Constitution. The jurisdiction of a national court cannot be invoked by anticipating a defense. In City of Fergus Falls *vs.* Fergus Falls Water Co., 19 C. C. A. 212; 72 Fed. 873, this was attempted but the court held it could not be done. Judge Caldwell, in delivering the opinion of the court said:

60

"In equity pleadings the complainant is allowed to anticipate and avoid a defense, and this is called 'the charging part of the bill.' But at law the plaintiff is never expected to state matters which should come more properly from the other side. It is sufficient for each party to make out his own case. It is sufficient for the plaintiff to state his own cause of action and he should not

anticipate his adversary's defense for the reason that the latter may never make the defense sought to be guarded against."

And it is equally well settled that the suggestion in a complaint in an action at law that the defendant may or will set up a defense based on a State statute repugnant to the constitution does not make the suit one arising under the constitution.

The averments of the complaint, beyond those which state a cause of action, are mere surplusage. When the statement of the plaintiff's cause of action, in legal or logical form, such as is required by the rules of good pleading, does not disclose that the suit is one arising under the Constitution or laws of the United States, then the suit is not one arising under that Constitution or those laws, and the circuit court has no jurisdiction."

In Tennessee *vs.* Union and Planters Bank, 152 U. S. 454, it was sought to invoke the jurisdiction of the national courts by a sug--estion in the bill "that the defendants will contend that the laws of the State under which the plaintiff claims is void, because in contravention of the Constitution of the United States," but it was held that:

"By the settled law of this court, as appears from the de-
61 cisions above cited, the suggestion of one party that the other will or may set up a claim under the Constitution or laws of the United States does not make the suit one arising under the Constitution or those laws."

To the same effect see Chappell *vs.* Waterworth, 155 U. S., 102; Walker *vs.* Collins, 167 U. S. 57; Sawyer *vs.* Kochersperger, 170 U. S. 303; Florida etc. Ry. Co. *vs.* Bell 176 U. S. 321; Arkansas *vs.* Kansas etc. Coal Co. 183 U. S. 185; Montana Ore Company *vs.* Boston Mining Company, 35 C. C. A. 1, 5; 93 Fed. 274, 279.

Treating the allegations anticipating the defendant's defense as surplusage, there is clearly no Federal question involved, and the court is without jurisdiction.

Endorsed: Filed January 12th, 1903 W. P. Feild clerk.

62 And on March 14th, 1902 the following proceedings were had to-wit:—

HIPPOLITE FILHIOL ET AL.
vs. } 5224.
GEORGE H. TORNEY.

Come the plaintiffs by W. S. and F. L. McCain Esqs., their attorneys and by leave of court file herein their assignment of errors and petition for writ of error; and said plaintiffs having executed a bond in due form of law which is approved by the court and the same being considered it is ordered that a writ of error issue herein to remove this cause to the Supreme Court of the United States and that a citation issue to said defendant George H. Torney.

And come said plaintiffs by their said attorneys and file herein their writ of error and citation which are duly allowed and signed by the court and service of the same duly accepted by the said defendant.

Which assignment of errors is as follows.

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY.

And now comes Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse by their mother and next friend; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, and Margaret A. Horton Campbell, Lizzie S. Cochran, and Robert R. Sanford,
63 Mary A. Bres, Ellen M. Parker, George B. Muse, and Mary L. Muse, Malvina R. Muse Bowman, Bessie Muse and James Fort Muse, Mary E. Behen, Alice F. South, Victoria A. Horton Bartholomew, Frederick Horton and Joseph E. J. Muse, by their counsel W. S. and F. L. McCain and respectfully represent that they feel themselves aggrieved by the judgem-nt of the circuit court of the United States for the western division of the eastern district of Arkansas, and by the rulings and decisions of said court in the said action leading to such judgem-nt, and respectfully assign error in the said judgment as follows:

1. The said circuit court erred in rendering the said judgem-nt upon the record.

2. The said circuit court erred in sustaining the demurrer to the complaint in said action, and in not overruling the same.

3. The said circuit court erred in holding that such court was without jurisdiction to hear, try and determine said action.

4. The said court erred in holding that the allegations in the complaint were or are insufficient to confer jurisdiction as of an action arising under the treaty with France set up in said complaint.

5. The said court erred in holding that the allegations in the complaint in said action were or are insufficient to show a cause of action arising to the plaintiffs against the defendant by virtue of the third article of the said treaty with France.

6. The said court erred in holding that the allegations in the complaint in said action were or are insufficient to confer jurisdiction as of an action arising under the Constitution of the United States as set up in the said complaint.

7. The said court erred in holding that the allegations of the com-

plaint in said action were or are insufficient to show a cause
64 of action in favor of the plaintiffs and against the defendants arising to the plaintiffs by virtue of the Constitution of the United States in the provisions of the fifth amendment thereof.

8. The said court erred in holding that the plaintiffs were not entitled to recover the premises described in the complaint according to the allegations thereof and the prayer for a judgment therein contained.

9. The court erred in divers other matters manifest upon the face of the record of said action.

Wherefore the plaintiffs in error pray this honorable court to examine and correct the errors assigned and for the reversal of the judgem-nt of the circuit court of the United States for the western division of the eastern district of Arkansas in the above entitled cause.

(Signed) W. S. AND F. L. McCAIN,
Attorneys for Plaintiffs.

Endorsed: Filed March 14th, 1903, W. P. Feild, clerk.

Which petition for writ of error is as follows:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

HIPPOLITE FILHIOL ET AL.
vs.
GEORGE H. TORNEY.

The petitioners Hippolite Filhiol, Francis J. Watts, Harriet
65 L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bres, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, Eugene Muse and Cecil Muse, Frank C. Bres, Ferdinand A. Fenner, Blanch- F. Power, Robert W. Fenner, Margaret A. H. Campbell, Lizzie S. Cochran, Robert R. Sanford, Mary A. Bres, Ellen M. Parker, George B. Muse, Mary L. Muse, Malvina R. Muse Bowman, Bessie Muse, James F. Muse, Mary E. Behen, Alice F. South, Victoria A. H. Bartholomew, Frederick Horton and Joseph E. J. Muse the above named plaintiffs being aggrieved by the judgem-nt made and entered in the above entitled cause on the 12th day of January 1903 and the several rulings of the court herein file herewith their assignment of errors in said cause and pray a writ of error to the end that the rulings and judgem-nt of the court in said cause may be reversed by the Supreme Court of the United States.

(Signed) W. S. AND F. L. McCAIN,
Att'ys for Plaintiffs.

Writ of error allowed returnable within thirty days upon execution of bond for five hundred dollars ($500).

(Signed) JACOB TRIEBER,
U. S. District Judge.

Endorsed: Filed March 14th, 1903, W. P. Feild, clerk.

66 Which bond for appeal is as follows:

Know all men by these presents that we, Hippolite Filhiol, *et als.*, as principals and S. L. Crissey and James L. Pugh, Jr., as sureties, are held and firmly bound unto George H. Torney in the full and just sum of five hundred dollars to be paid to the said George H. Torney, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by th-ses presents.

Sealed with our seals and dated this 5th day of March in the year of our Lord one thousand nine hundred and three.

Whereas lately at a circuit court of the United States for the eastern district of Arkansas in a suit pending in said court between Hippolite Filhiol *et als.* plaintiffs and George H. Torney defendant a judgment was rendered against the plaintiffs and the said plaintiffs have obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such that if the plaintiffs shall prosecute said writ to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

SARDIS L. CRISSEY. [SEAL.]
JAMES L. PUGH, JR. [SEAL.]

Sealed and delivered in presence of—
A. H. WYMAN.
JOSEPH HARPER.

67 Subscribed and sworn to before me this 5th day of March A. D. 1903.

[SEAL.] (Signed) JOSEPH HARPER,
Notary Public.

Approved:
JACOB TRIEBER,
U. S. District Judge.

Endorsed: Filed March 14th, 1903 W. P. Feild, clerk.

68 UNITED STATES OF AMERICA, *ss:*

To George H. Torney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of United States for western division of eastern district of Arkansas wherein Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, Hattie S. Burch, Rowland M. Filhiol, Jerome Bres, Benedette H. Bress, James L. Sanford, Julia M. Watts, Mary A. Watts, Hardy H. Filhiol, Hippolite Bres, Alberta D. Sanford, Mrs. Ellen M. Coates, Andre A. Rowland, Julia M. Dabbs, Louis St. Claire Horton, and Eugene and Cecil Muse, by their mother and next friend; all residents of the State of Louisiana; Frank C. Bres, Ferdinand A. Fenner, Blanche F. Power, Robert W. Fenner, Margaret A. Horton Campbell, all residents of the State of Texas, Lizzie S. Cochran, Robert R. Sanford, and Charles C. Sanford, residents of the State of Mississippi, Mary A. Bres, resident of the State of Illinois, Ellen M. Parker, resident of the State of California, George B. Muse, and Mary L. Muse, resident- of the State of Minnesota, Malvina R. Muse Bowman, resident of the State of Wisconsin, Bessie Muse resident of the State of Iowa, James Fort Muse resident of the State of Oregon, Mary E. Behen, resident of the State of Missouri, Alice F. South, resident of Mexico, and Victoria A. Horton Bartholomew, now Mrs. J. D. A. Harris, resident of the State of Washington, Frederick Horton and Joseph E. J. Muse residence unknown plaintiff- in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Jacob Trieber judge of the circuit court of the United States, east. dist. Arkansas this 14th day of March, in the year of our Lord one thousand nine hundred and three.

JACOB TRIEBER,
U. S. District Judge, East. Dist. of Ark.

M'CH 14, 1903.

Service of this citation accepted.

WM. G. WHIPPLE,
Att'y for Def't.

Endorsed: Filed M'ch 14, 1903 W. P. Feild, clerk.

69 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

I, W. P. Feild, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the originals remaining of record in my office, of the assignment of errors and of all proceedings in case of Hippolite Filhiol *et al.*, *vs.* George H. Torney.

In witness whereof, I have hereunto set my hand and the seal of said court, this 25th day of March in the year of our Lord, one thousand nine hundred and three and of the Independence of the United States of America, the one hundred and twenty-seventh.

{ The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A. }

Attest: W. P. FEILD, *Clerk.*

Record $24.50.

Endorsed on cover: File No. 18,884. E. Arkansas C. C. U. S. Term No. 252. Hippolite Filhiol, Francis J. Watts, Harriet L. Watkins, *et al.*, plaintiffs in error, *vs.* George H. Torney. Filed April 6th, 1903.